

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAMON LEMONTE APPLEWHITE,

Plaintiff,

Case No. 1:07-CV-656

v.

Hon. Robert J. Jonker

MICHIGAN DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

ORDER APPROVING REPORT AND RECOMMENDATION

The Court has reviewed the Magistrate Judge's Report and Recommendation (docket # 25), and Plaintiff's "Protest and Rebuttal" (docket # 26), which the Court treats as Plaintiff's Objections to the Report and Recommendation. The Court has also reviewed all other pertinent matters of record.

Under the Federal Rules of Civil Procedure, when a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Report and Recommendation recommends that Plaintiff's claims against Defendant Warden Phillips be dismissed on summary judgment for failure to exhaust, and that Plaintiff's claims against Defendant Michigan Department of Corrections ("MDOC") be dismissed on summary judgment under Eleventh Amendment sovereign immunity. The Report and Recommendation also recommends that Plaintiff's motion and related filings seeking summary judgment (docket ## 18, 19, 24) be denied because they are really a response to Defendants' motions, and that Defendant Meyer's motion for summary judgment (docket # 10) be denied because Plaintiff exhausted his grievance against her. Defendants do not object to any portion of the Report and Recommendation. Plaintiff objects to at least those portions of the Report and Recommendation advising dismissal of claims against MDOC and Warden Phillips. The Court has reviewed de novo the claims and evidence presented to Magistrate Judge Brenneman; the Report and Recommendation itself; Plaintiff's Objection; and all other pertinent matters of record. After its review, the Court finds Magistrate Judge Brenneman's Report and Recommendation to be both factually sound and legally correct.

Plaintiff's objection to dismissal of claims against Warden Phillips is a perfunctory claim that the Warden is ultimately responsible for everything that happens at the facility, and a factual claim that the Warden had actual knowledge of Plaintiff's complaint in this case. Neither objection addresses the merits of the exhaustion requirement and Plaintiff's failure to meet it in the case of Warden Phillips, as accurately described by the Magistrate Judge. Plaintiff's objection to dismissal of MDOC on grounds of Eleventh Amendment sovereign immunity is a largely unintelligible claim that the State waived this defense. The objection does nothing to undercut the well-established

authority cited by the Magistrate Judge to support dismissal of claims against MDOC in this context on Eleventh Amendment grounds. No party has identified any other claimed errors in the Report and Recommendation, and the Court discerns none.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is **APPROVED AND ADOPTED** as the opinion of the Court.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (docket # 18, 19, 24) be **DENIED**, that Defendant Meyer's motion for summary judgment (docket # 10) be **DENIED**, that Defendant Warden Phillips' motion for summary judgment (docket # 11) be **GRANTED**, and that MDOC's motion for summary judgment (docket # 14) be **GRANTED**.

IT IS FURTHER ORDERED that Defendants Phillips and MDOC be **DISMISSED** from this action.

Dated: September 3, 2008

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE